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IN THE

Supreme Court of the United States

October Term, 1955

No. 632

ELI B. CASTLEMAN, MARION V. CASTLEMAN LOUIS FEUERMAN, JULIUS NOVEMBER, ELEANOR NOVEMBER AND BERNARD REICH,

Petitioners,

against

HOWARD R. HUGHES, RKO PICTURES INC., ELI B. CASTLEMAN, MARION V. CASTLEMAN and LOUIS FEUERMAN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Corrective Statement

By reason of dissatisfaction with the presentation of the "Statement" by the "Petitioners", these respondents* make the following Corrective Statement to rectify inaccuracies and supply omissions.

These respondents submit that an advocate's partisan zeal is no license to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading.

* Eli B. Castleman, Marion V. Castleman and Louis Feuerman, who are also named, in the caption, as "Petitioners".

Preliminarily, it will be observed that the "Petitioners'" statement is composed largely of unwarranted conclusions and impermissible inferences rather than of facts of record.

• • •

The action, in the United States District Court for the Southern District of California, was but one of four *identical* minority stockholder actions for an accounting (R. 25) by the *same* plaintiffs (R. 97) against the directors of RKO, in separate jurisdictions (R. 319).

The estimate of 38 million dollars as damages to RKO is hearsay based on hearsay, without any foundation in fact. The Record reference at R. 266 is solely to Mr. Bernard Reich's unsupported "idea".

Without record-reference Mr. Reich claims that "throughout the proceedings below" he was the only attorney of record (Pet. 3). That is contrary to fact. The Record at p. 121 shows that Louis Kipnis was admitted in the District Court *pro hac vice* at least 10 months before the entry of the judgment dismissing the action. Moreover, from the date of the filing of the complaint Kipnis' name appeared as plaintiffs' counsel (R. 26) of record.

• • •

The paragraph beginning at the bottom of page "3" of the Petition consists of three sentences. No record citation is given to support either the first or the second sentence of said paragraph, nor can there be any. Actually, the record is to the contrary (R. 223 and 225). Please also see Appendix A and B of the Petition. Moreover, the references that appear at the conclusion of said paragraph do not relate to the two prior sentences. As to the final sentence, the references are to inferences bottomed on the pseudo-logical proposition of *post hoc ergo propter hoc.*

There never was any conspiracy of any kind or nature and the record is clear on it (R. 225).

Mr. Reich and all parties in the Nevada action were given notice and opportunity to be heard "with respect to certain charges made by one Bernard Reich" as to conspiracy and collusion (R. 117). Indeed, the fact of Mr. Reich's "charges" asking the Nevada Court to appoint a special master was contained in the proxy statement, which "was duly mailed to all stockholders of RKO" (R. 189) on or about March 1, 1954. Mr. Reich avoided and evaded testifying at the scheduled hearing in open Court (R. 117) as to his "charges" by hospitalizing himself (R. 334).

* * *

The statement as to the conduct of the District Court (Pet. 5) is, by reason of the omission of record-facts dealing with the concurrence therein by Mr. Reich, untrue and misleading. The District Court had the action under its constant supervision involving at least 20 contacts therewith (R. Index iii, iv). The inference of "abdication" on the part of the District Court, which this Court is asked to draw, is utterly impermissible in the light of any one of these statements by Petitioner Reich:

For example:

> "I say only at this time that this action should not be dismissed and that this Court should retain jurisdiction pending the outcome of the state action in Nevada" (R. 55).
>
> "The undersigned does not insist that this Court try the case" (R. 85).
>
> "I told Judge Harrison that I wanted the California action to be a stand-by action * * *" (R. 142).
>
> "* * * I was willing to let Mr. Hughes' motion to quash to go by default on condition that the mo-

> tion for security be opposed and that the California action * * * would remain as a stand-by action * * *" (R. 169).

Finally, when the District Court took the responsibility for continuing the motions until after the Nevada case was disposed of, Mr. Reich said:

> "Very well, your Honor, I accept the ruling" (R. 247).

In the face of the actual record it ill-becomes Mr. Reich to accuse the District Court of "abdication".

* * *

Next, the reference as to the proposed intervention by Julius and Eleanor November (Pet. 5) in the California action fails to disclose to this Court that the Final Order in the Nevada action showed that these same persons had appeared therein (R. 237, 189) and had some months before sought (unsuccessfully) to intervene in the Nevada action (R. 337). Moreover, their motion for intervention was filed on March 11, 1954 (R. 175), in the District Court one month *after* Mr. Hughes had made his offer (February 7th, 1954) (R. 219) to purchase the assets of RKO Pictures Corp., which offer received nationwide press and radio coverage. These facts were, however, before the District Court (R. 189).

* * *

Next, at the top of page 6 of the Petition reference is made to the Findings of Fact and Conclusions of Law of the Nevada court which are said to be "wholly in favor of Hughes on the merits". Mr. Reich prepared the record for the Court of Appeals but saw fit to cut out vast portions of the Findings and Conclusions (R. 384). The printed record-references are to Mr. Reich's own inferences and conclusions. The complete record speaks for

itself. Mr. Reich's own statements in the Petition and in the printed "Record" are contrary to fact. The complete Findings, unedited by petitioner Reich, revealed many areas of triable issues of fact which were finally settled and compromised in the Nevada action (R. 223). Those facts were before the District Court (R. 185).

• • •

"Petitioners" refer to the Delaware judgment citing it as *Schiff* v. *RKO Pictures Corporation*, 104 A. 2d 267 (1954) (Pet. "6"). Notice of the pendency of said action was contained in a proxy statement, cleared by the United States Securities & Exchange Commission, which went to the 15,000 shareholders of RKO Pictures Corporation (R. 189), including the "Petitioners", all pursuant to Court order. That fact was before the District Court (R. 193, 189).

• • •

Tangential reference to counsel fees on page "6" of the Petition points up the omission by Mr. Reich of any mention of the fact that what was involved below were nothing more than varying aspects of his pursuit of legal fees. Even on a statistical basis the record before the Courts below and here, is devoted 26% (105 pages out of 389) to the subject of lawyers' fees. The District Court recognized the nature of Mr. Reich's activities below before he ever filed his formal applications for fees (R. 373, 367).

The judgment of the District Court (R. 360) is comprised of three segments, two of which have to do with Mr. Reich's fee applications, which were denied. That was the judgment appealed from (R. 362). The Court of Appeals decision (Appendix A, Pet.) clearly illuminated the proclivities of Mr. Reich in the litigation herein.

The "errors" specified at page "7" of the Petition running in quotation marks from "1" through "6c" do not appear in the record before this Court. They have

been extracted from the brief submitted by Mr. Reich to the Court of Appeals. In this reproduced, but partial, extract supplied by Mr. Reich, he caused to be eliminated item No. "8", also dealing with fees, which reads as follows:

> "8. In denying the motions (2) for counsel fees and costs as against the defendant (other than the bank) and as against the plaintiffs".

The deliberate omission of "error" No. "8" does not change the fact, nor the Record, that primarily what the District Court was occupied with in the multitude of motions made before it was the award of fees to Mr. Reich. The District Court was all too correct, it must be sadly conceded, when it stated during one of the twenty times that the action was before it:

> "It is a spectacle to find lawyers fighting among themselves. It does not bring credit upon anybody" (R. 373).

Please also see R. 367, 370 and 371.

* * *

Without record reference Mr. Reich states (Pet. 7) that no court in any adversary proceeding examined his "charges" that "the Nevada action was a fraud" (whatever that may mean). (Parenthetically, the very action which Mr. Reich now calls "a fraud" is the one in which he sought to be named as co-counsel (R. 323).) The fact is that the Nevada court examined the "charges" (R. 223-225). The District Court of necessity must have reviewed them and the Court of Appeals stated (footnote 1, Appendix "A", of the Petition) "Reich argues that the Nevada action was collusive but the record does not bear out his contention."

In the light of the supplied omissions and of the corrections, the "questions presented" stand revealed as synthetic froth.

There is neither substance nor merit to the Petition.

Reasons for Denying the Petition

"It would be time-saving if we had a descriptive catalogue of recurrent types of fallacies encountered in arguments addressed to the courts, giving each of them a number, so that, in a particular case, we could say, 'This is an instance of Fallacy No.—'. Such a device would be helpful here. For the fallacy of the appellee's argument is of a familiar kind: In formulating the reasons for their decisions, judges often adopt rulings made in previous decisions in which the facts were somewhat similar, saying, in effect, 'This situation is sufficiently like those which we previously considered so that we can disregard the differences and restrict ourselves to the resemblances'. And, thus ignoring—for the purpose immediately at hand—the unlikenesses, the situations are frequently spoken of as identical. But elliptical discussions of cases partly alike, as if there were complete identity, is merely for convenience. There is present, although it may be unexpressed, an 'as if', a 'let's pretend'—a simile or metaphor. Such 'as-if' or metaphorical thinking is invaluable in all provinces of thought (not excepting that of science). However, some of the greatest errors in thinking have arisen from the mechanical, unreflective, application of old formulations—forgetful of a tacit 'as-if'—to new situations which are sufficiently discrepant from the old so that the emphasis on the likenesses is misleading and the neglect of the differences leads to unfortunate or foolish consequences" (*United Shipyards, Inc.* v. *Hoey,* 131 F. 2d 525, 526; 2 Cir. (1942).

So here, do we have mechanical, unreflective application of old formulations—forgetful of a tacit "as-if". "And, thus ignoring—the unlikenesses":

We find the wise exercise of judicial discretion by the District Court treated by Mr. Reich "*as if*" it were "abdication".

We find a dismissal, with prejudice, on a speaking motion treated "*as if*" it were a voluntary termination of a class suit.

We find a motion for intervention spoken of "*as if*" Rule 24 F. R. C. P. is a self-executing one.

We find the fallacious doctrine of *post hoc ergo propter hoc* treated "*as if*" the time sequence of events implied a causal relation between them.

And we find "charges" treated "*as if*" they were proven facts.

The Nevada Judgment.

Two basic misconceptions underlie "petitioners" attempt collaterally to attack the Nevada judgment. (The Castlemans' and the Novembers are without standing to make the attack; the former, as *the* parties in the Nevada action, and the latter, as shareholders of RKO to whom notice and opportunity to be heard had been given and who, by their own attorneys, were in Court (189). This leaves, solely, Mr. Reich, but he is not a shareholder of RKO).

The first conceptual error is as to the nature of Rule 23 of the Federal Rules of Civil Procedure. If, contrary to interpretation, it be insisted that a dismissal, with prejudice, on a speaking motion, is a voluntary termination prohibited by the Rule, then no secondary class action

may ever be defeated by motion for summary judgment or other motion addressed to the Court. But, as *Winkelman* v. *General Motors Corporation,* 48 F. Supp. 490 (D. C. S. D. N. Y.) (1942), instructs us:

> "* * *, the rule was adopted to secure not routine approval of a consent decree, but in order to insure supervision of the court for the protection of the corporation and all the stockholders. Cf. McLaughlin, op. cit. supra."

This is precisely what took place in Nevada (R. 223-225).

The second conceptual error is that a shareholder, or member of a class, is illimitably free, after notice by Court order, to shun an opportunity to be heard and refrain from presenting evidence of "collusion" in a particular court, not take an appeal therein and later reactivate these "charges" in another court, at another time. Such an attack was attempted in *Stella, etc.* v. *Kaiser, et al.,* 218 F .2d 64, 2 Cir. (1954), but the Court held there that an out-of-state judgment was entitled to the effect of *res judicata* and not subject to collateral attack.

The attempt here collaterally to attack the Nevada judgment was properly denied by the District Court and Court of Appeals.

* * *

The District Court and the Court of Appeals were cognizant of the holding in *Mann* v. *Superior Court of Los Angeles County,* 127 P. 2d 970, 975, where it was written:

> "A representative suit such as a stockholder's derivative suit, involving as it often does the possibility of large financial returns, is not an open sesame for fees to counsel for interveners."

Does Mr. Reich seriously mean that no discretion is to be allowed to a District Court in intervention applications? Is this something for this Court to waste its time on?

The Delaware Judgment.

On the matter of "mootness" by reason of the Delaware judgment on the R.K.O. sale of assets, we know that it makes no difference how a court learns of the mootness of an action (*Puget Sound Power & Light Co.* v. *City of Seattle,* 271 Fed. 958; 9 Cir. (1921)).

The District Court, here, learned of it first hand, by motion with supporting documents (R. 184-185). And it followed the Delaware interpretation of a Delaware statute concerning a Delaware Corporation by the Delaware Court (Pet., Appendix B).

The Chancellor of Delaware viewed the action of *Schiff* v. *RKO Pictures* thus:

> "This is a proposed sale of assets under 8 Del. C. Sec. 271" (*Schiff* v. *RKO Pictures Corporation,* 104 A. 2d 267 at 270).

The decision of the Chancellor was, therefore, a decision by a Delaware Court relative to a Delaware statute tried in a Delaware tribunal. Moreover, RKO Pictures Corporation was a creature of the State of Delaware. Its charter rights and powers were being examined.

When the Delaware judgment came before it, the District Court accorded to it the full faith and credit to which it is entitled, and the Court of Appeals affirmed the District Court (Appendix to Pet. A, B).

Thus spoke the Chancellor of Delaware, in the *Schiff* case, *supra,* on the subject of "Bad Faith" (at p. 280 of 104 A. 2):

> "Finally, plaintiffs charge that the proposed sale of assets is tainted with bad faith. Plaintiffs' claim of fraud or bad faith is at best an invitation to reconsider as a whole the various individual charges just reviewed. Conceding that Hughes, by his offer, will by-pass the impending derivative waste actions against him, that consequence does not condemn the transaction. It is not uncommon for corporate executives to attempt to clean the litigation slate in one fell swoop in order to be done with it."

Could the District Court and Court of Appeals refuse to credit fully the Delaware judgment on a matter of Delaware law arising under a Delaware statute?

This Court in *Albertson* v. *Millard,* 345 U. S. 242, 97 L. ed. 983 at 985, said:

> "Interpretation of state legislation is primarily the function of state authorities, judicial and administrative. The construction given to a state statute by the state courts is binding upon federal courts."

And that is how the District Court and the Court of Appeals treated the matter.

* * *

This Petition is an attempt to transform a lawyers' fee squabble into a case "of major concern to the integrity of the Federal judicial process." The following is what the District Court had, in part, before it while Mr. Reich was loftily talking about the integrity of the federal judicial process:

Said Mr. Reich in his fee application (R. 285):

> "9. Should, however, this Court be inclined to dismiss this action, then I respectfully request it to act on the motion herein for counsel fees and costs as did the Court in Las Vegas, Nevada * * *".

and he concluded thus:

> "Wherefore I respectfully pray that if this Court dismisses the action, it should fix and determine my counsel fees and costs and condition any dismissal on payment of them to me by the defendants."

This respectful prayer followed a lengthy and lurid farrago of "offenses" for which there was stated to be neither balm nor a monetary equivalent of balm for petitioner Reich.

No great acumen was needed either in the District Court or Court of Appeals to appraise, in this context, Mr. Reich's protestations concerning integrity; nor, it is respectfully submitted, is any needed here.

* * *

Finally, we have the matter of the District Court's control over its own docket here denominated "error".

The putting "off-calendar" of the motions of the parties (not only those of Mr. Reich) was unquestionably a discretionary matter. As the late Mr. Justice Cardozo wrote in *Landis* v. *North American Company*, 299 U. S. 248, 81 L. ed. 153 (1936), at page 158:

> "Viewing the problem as one of power, and of power only, we find ourselves unable to assent to the suggestion that before proceedings in one suit may be stayed to abide the proceedings in another, the parties to be two causes must be shown to be the same and the issues identical * * * (citing cases). Apart, however, from any concession, the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants. How this

can be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance * * *. Occasions may arise when it would be a 'scandal to the administration of justice' in the phrase of Jessel, M. R. (Amos v. Chadwick, L. R. 9 Ch. Div. 459, 462), if power to coordinate the business of the court efficiently and sensibly were lacking altogether."

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Dated: February 1956.

Respectfully submitted,

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BRIEF OF RKO RADIO PICTURES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement of Case

Petitioners' statement necessitates a statement correcting inaccuracies and supplying omissions. The actual facts are beyond reasonable controversy:

1. Parties and Judgments Below.

This cause originated as a stockholders' derivative action in the Southern District of California by *Eli B. Castleman and Marion V. Castleman, doing business as*

Wolverine Textile Company, and Louis Feuerman (herein collectively referred to as "the Castlemans"), Plaintiffs, against *Howard R. Hughes* (herein "Hughes"), *RKO Pictures Corporation* (herein "RKO"), *RKO Radio Pictures, Inc.* (herein "Radio"), and *The Chase National Bank of the City of New York* (herein "Chase"), Defendants.

The final judgment of the district court (a) dismissed the cause with prejudice and (b) denied two applications of Bernard Reich, Esq., (herein "Reich") for counsel fees and costs, one directed against his former clients, the Castlemans, and one directed against Radio (R. 360).

The Court of Appeals, per curiam, unanimously affirmed (Petition, Appendix A).

2. "Parties" to Petition.

Five stockholders of RKO are named as "Petitioners." Three—the Castleman group—are so designated without authority (conceded, Petition, p. 1, footnote), and are named also as Respondents.[1] The other two stockholders—the Novembers—were not parties below. Sixteen months after institution of the California action, and four weeks before the motion to dismiss such action, they sought leave to intervene (see p. 9, below). The sixth "petitioner," Reich, was not a party.

Radio is the only actual Respondent. Jurisdiction was never obtained over RKO, Chase, or Hughes.

Radio's presence in the case is anomalous: at the inception of this litigation Radio was a wholly owned subsidiary of RKO; no plaintiff or attempted intervenor owned stock in Radio, and of course no relief was or can be sought

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[1] Since it is a contradiction for the Castlemans to appear on both sides of the docket, since it is undisputed that they discharged Reich months before the final judgment (R. 63), and since Reich concedes that they have not authorized this "petition," they have at best only a tenuous connection with this proceeding.

for or against it. In July, 1955, all the issued and outstanding capital stock of Radio was sold to General Teleradio, Inc., which is not now and never has been a party.[2]

Yet Radio has now been dragged through three courts by discharged counsel of the Castlemans, in violation of a court approved stipulation, without authority from his prior clients, in an action which is without prospect of any possible constructive result (unless further fees for Reich are the object sought).[3]

As the sole Respondent, therefore, Radio recognizes its obligation to place before this Honorable Court the facts, in order that further waste and expense may be prevented.

3. Institution of Stockholders' Actions by Castlemans in New York, California, and Nevada.

The Castlemans, directly represented at all relevant times only by Louis Kipnis, Esq. (herein "Kipnis") and Leo Mittleman, Esq., New York attorneys, filed a series of substantially identical stockholders' actions involving RKO. After formal demand in October, 1952 (R. 27-28), they first commenced two actions in New York (R. 100, 136-7). Hughes, not a resident of New York, could not be served and did not appear (R. 153, 319).[4]

On December 13, 1952, Kipnis retained Reich as his local co-counsel to institute the instant "stand-by" derivative action for the Castlemans in California (R. 153-4; 319-

---

[2] Affidavit dated October 20, 1955 filed in the United States Court of Appeals.

[3] Reich has settled his fee claims against the Castlemans for an undisclosed amount. VARIETY, Jan. 13, 1956, p. 13. In his Petition, Reich does not bring forward the question of fees, but neither does he mention the settlement with the Castlemans or renounce his prior efforts to impose fees on Radio.

[4] Sidney Schwartz, another stockholder, filed a similar action in New York in November, 1952, which never progressed to the joinder of issue (R. 217).

20). This action was filed December 15, 1952, but no attempt was then made to serve any defendant.

The indispensable parties in the actions were Hughes and RKO. Neither was ever brought within the jurisdiction of the California court. No effort was made to serve RKO, and purported service on Hughes was quashed by the Court (R. 40, 131).

Shortly after the institution of the California action, Kipnis met with Hughes' attorney and Floyd Odlum, a large stockholder in RKO (R. 154-5; 320-1). At this conference Kipnis learned that Hughes was a resident of Nevada (R. 320), and "Hughes' representative stated that plaintiffs were free to pursue any policy or course they desired but if they instituted suit in Las Vegas, Nevada, where Hughes resides and is domiciled, he would appear and answer" (R. 224).

On December 23, 1952, the Castlemans sued in Nevada (R. 184). The Nevada complaint was substantially identical with that in the California action except that the Hughes Tool Company and all other directors of RKO were named as defendants in addition to Hughes (R. 187, 217). Reich concedes this (R. 137).

All defendants answered in the Nevada action, which thus came to issue as the only case in which all indispensable parties had been (or, in all likelihood, ever could be) brought before the court (R. 239-240). Pretrial discovery and preparation for trial proceeded (R. 224).

Meanwhile, the California action was quiescent until March 4, 1953, when Reich filed an amended complaint and Radio was served (R. 138). Kipnis and Mittleman appear as co-counsel on this complaint (R. 26), as they had on the original complaint which is not printed in the Record. Reich attempted to serve Hughes by having a copy of the summons and complaint left with the desk clerk at the Beverly Hills Hotel in Los Angeles (R. 138). Reich and

Kipnis differ as to whether Reich was authorized to attempt service in what both considered a "stand-by" action (R. 142-3). Certainly thereafter Kipnis and Reich were continuously at odds. Without detailing their struggle (R. 140-7), we note that on May 7, 1953, Kipnis discharged Reich and asked that he consent to a substitution of counsel (R. 157).[5]

On May 22, 1953, Reich signed a stipulation, approved by the Court, staying all proceedings in the California action until the determination of Radio's motion seeking (under Calif. Corp. Code, § 834) security for its costs (R. 37-9). The security motion was never determined. Radio therefore never answered the complaint in California.

Every step taken by Reich as against Radio after May 25, 1953, either below or here, violated the Court's order and this stipulation.

4. First Dismissal of the California Action and Vacation of Order.

On June 8, 1953, the trial court quashed Reich's purported service on Hughes and dismissed the action (R. 40-2). Hughes' counsel immediately advised Kipnis of the Court's order (R. 65). The dismissal was vacated on October 5, 1953, but the order quashing the purported service on Hughes was sustained (R. 71-2; 131-3).[6]

No further effort ever was made to serve either RKO or Hughes in the California action.

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[5] Meantime, in April, 1953, another stockholder, Milton Friedman, had filed an action in the state court and a second action in the federal court, both in California (R. 218).

[6] Meantime, in August, 1953, two stockholders, Schiff and Sachs, had instituted a derivative action in New York alleging a cause of action embraced in the Nevada action (R. 218).

5. Periodic Continuances of California Action.

With neither Hughes nor RKO before it, and with a stay stipulated and ordered as to Radio, the California court periodically continued the action pending final disposition of the Nevada case (R. 118-121; 121-2; 122-3; 173-4; 181-3).

In exercising this discretion, the trial judge made a matter of record his knowledge of the ability and integrity of the judge before whom the Nevada action was at issue (e.g., R. 370). Reich never has questioned these views.

Though his course in search of fees resulted in Reich taking various inconsistent positions, the court's decision to continue the action pending the outcome in Nevada had his blessing on several occasions. See, for example, April, 1953 (R. 142); September, 1953 (R. 55); October, 1953 (R. 85); February, 1954 (R. 169).

6. Reich's Charges of "Collusion."

As time passed, with his differences with his employers growing more acute, Reich naturally became concerned about his fees. His request to be named as co-counsel in Nevada was rejected (R. 322), as apparently also was his request for a letter agreement to be filed with "the defendants in New York, Nevada and California" (R. 166). Recognizing that the decision in Nevada would be *res judicata* in California, Reich in October, 1953, some ten months after institution of the Nevada action, began recklessly to charge all defendants and his employer, plaintiffs' lead counsel, with "collusion in submitting the action to the Nevada court" (R. 95).

This charge was not asserted solely in California. Reich, corresponding directly with the judge, invited the Nevada court to investigate the circumstances under which the Castleman action had come to issue in Nevada (R. 99-105).

But Reich refused to appear when (on motion by Hughes) the Nevada court promptly heard the complaint (R. 116-18). In fact, Reich in all his subsequent reiterations of the charge of "collusion" never passed from the realm of insinuation and innuendo into an area of probative evidence or even legitimate inference. As the Court of Appeals found, "Reich argues that the Nevada action was collusive, but the record does not bear out his contention."

The Nevada Rules of Civil Procedure with respect to the disposition of class actions are identical to the federal rules.[7]

The Nevada court, in accordance with the duty imposed by Rule 23(c) of the Rules, remained cognizant of Reich's charge and ultimately disposed of it, on the merits based on the evidence, in its findings of fact following a hearing at which both the Castlemans and Novembers appeared by counsel (R. 223-5. See below for appearances).

7. Hughes' Offer.

On February 7, 1954, Hughes offered to buy all assets of RKO *including all claims involved in the pending stockholders' suits* for $23,489,478 (R. 195 et seq.). The net effect of this offer was to cut through the several pending controversies and to extinguish all stockholder suits (R. 195; 200-1).

Hughes' offer was initially approved by the RKO Board of Directors and then submitted to the RKO stockholders in

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[7] Paragraph (c) of Nevada's Rule 23 covering "Class Actions" reads, in so far as pertinent, as follows: "A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs . . ."

Derivative stockholder actions undeniably come within the purview of Rule 23(a)(1). See 3 Moore's Fed. Prac., § 23.08.

a proxy statement approved by the Securities and Exchange Commission (R. 220). At the stockholders' meeting called for the purpose, the sale was approved. Of the total 3,891,526 shares entitled to vote, 3,358,116 shares were voted in favor of the offer and 73,227 against. Excluding Hughes' shares, 2,022,769 were voted in favor of the offer (R. 188).

8. Validity of Sale of Assets, Including Claims, Sustained by Delaware Court.

Immediately after the Hughes' offer, suit was instituted by RKO stockholders in Delaware, the state of RKO's incorporation, to enjoin the sale of the assets.

The validity of the sale, the propriety of including therein the sale of any claims asserted in the stockholders' action, and the fairness of the offer were upheld, after a hotly contested trial, in the case of *Schiff* v. *RKO Pictures Corporation,* 104 Atl. 2d 267 (1954). In his brief in the Court of Appeals Reich concedes "that the Delaware action is *res judicata* on the issue as to whether the sale was fair and that the Appellees do not and cannot challenge that judgment" (Brief, pp. 19-20).

This, of course, is a concession that the very claims alleged in this action are now extinguished because they are validly vested in Hughes. It concedes mootness.

9. Validity of Sale of Assets Sustained by Nevada Court.

In February, 1954, Hughes moved to dismiss the Nevada action with prejudice in the event the stockholders of RKO accepted his offer (R. 200). Pursuant to order of the court, notice of hearing of this motion, *in form prescribed by the court itself,* together with a copy of the motion, was mailed on March 1, 1954, to each RKO stockholder, including the Castlemans and the Novembers (R. 188-9; 200-3; 214-15; 227-236).

On March 22, 1954, the Castlemans and other stockholders appeared in person or by counsel before the Nevada court and a full hearing on oral and documentary evidence ensued (R. 189-226).

The Novembers, petitioners, appeared by their Nevada attorneys at this hearing and were advised in open court that they were free fully to participate and to examine witnesses (R. 189).

On March 30, 1954, the Nevada court filed extensive findings of fact and conclusions of law, portions of which are printed in the present Record (R. 214-225). The Record omits the section of the findings which analyzed each of the charges made as a basis of claimed liability (R. 223).[8] Pursuant to Rule 23(c) the Nevada court approved the sale of RKO's assets to Hughes as a compromise and settlement of the stockholder actions (R. 226-8). On April 1, 1954, after consummation of the sale, the Nevada court dismissed the action with prejudice (R. 192-3; 231-2).

10. Application by Novembers to Intervene in California.

Over a month after Hughes' offer, and after they had received notice of and an invitation to participate in the Nevada hearing, the Novembers, through Reich, on March 11, 1954, asked leave to intervene in the California action (R. 177).

Thereafter, the Novembers appeared by their attorneys at the Nevada hearing (R. 189).

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[8] Having elected in printing the record to omit the findings which analyzed the charges made against Hughes (R. 223), Petitioners have no record basis for the statement in the Petition for Certiorari (Pet. p. 6) that the Nevada court made "findings of fact and conclusions of law wholly in favor of Hughes on the merits." As a matter of fact, this statement is inaccurate, but is only one of the many inaccuracies in the Petition.

11. Radio's Motion to Dismiss Below.

On April 7, 1954, Radio moved to dismiss the California action on the ground that the final judgments in Delaware and Nevada were *res judicata* and rendered the California proceeding moot (R. 184-6; 193-4). Perforce, they also rendered moot the belated November application to intervene.

On August 5, 1954, the trial court granted Radio's motion to dismiss upon two grounds: (a) consummation of the sale of all causes of action to the alleged principal wrongdoer, established as valid in the Delaware action, rendered the California action moot; and (b) the Nevada judgment, resting upon identical charges, was *res judicata* as to all issues tendered in the California complaint (R. 356-7; 360-1).

ARGUMENT

I

The Delaware Court, in application of the Delaware law to a Delaware corporation, having sustained the validity of the sale of RKO's assets there is no federal question involved.

Ultimately Petitioners must answer the question as to what they propose to litigate in the event that this court grants certiorari and reverses the unanimous decisions of all lower court judges.[9] They concede that the sale of assets, sustained by the Delaware Court, is not subject to

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[9] We note in passing "the wise rule of judicial administration under which this Court does not upset concurrent findings of two lower courts in the ascertainment of facts and the relevant inferences to be drawn from them." Justice Frankfurter, dissent, *Securities and Exchange Com'n* v. *W. J. Howey Co.*, 328 U. S. at 302 (1946). Here three lower courts have rejected Reich's charges.

collateral attack in California. In *Schiff* v. *RKO Pictures Corp.*, 104 Atl. 2d 267-280 (1954), the Chancellor recognized that the effect of the sale would be to put an end to further litigation of the various stockholders' actions, which were then pending in no less than six proceedings in New York, California, and Nevada.

Manifestly, the legality of the sale of such contingent assets is a matter of state law. The Chancellor specifically sustained the validity of their sale (See 104 Atl. 2d at p. 280). The determination by the Delaware court of the Delaware law with respect to a Delaware corporation is binding not only upon the federal judiciary but also upon Petitioners.

Do Petitioners seriously propose that this Court should enter into an academic study of the correctness of the Delaware court's exposition of the Delaware law as applicable to a Delaware corporation on an issue which they admit to be foreclosed by the doctrine of *res judicata*? Do they seriously propose that, after such an academic exercise, the judgment below should be reversed so that they may attempt to prosecute a claim against the very individual who is the sole owner of such claim and who would be the sole beneficiary and recipient of any recovery against himself (except as such "recovery" might be mulcted for a fee for Reich)?

II

Each "petitioner" and each RKO stockholder is bound by the Nevada judgment.

As an individual, Reich obviously has no standing. In the most charitable light, Reich is a mere volunteer without even a shadow of justiciable interest.

The Castlemans, having been plaintiffs in the Nevada suit, are estopped from attacking the Nevada judgment

collaterally. They participated in all proceedings leading to that decree; accepted its benefits; did not appeal; and are bound. Reich as erstwhile California counsel to the Castlemans stands in privity with them and is also estopped from attacking the Nevada judgment. 49 C. J. S., Judgments, § 434-b; 1 Freeman on Judgments (5th Ed., 1925), §§ 305, 317.

The Novembers by their Nevada counsel appeared at and were free to participate in the hearing in Nevada which resulted in that Court's final judgment of April 1, 1954 (R. 236). Since they did not appeal the judgment, as was their right after court approval of the compromise and settlement (see, e.g., *Masterson* v. *Pergament*, 203 F. 2d 315 [6th Cir., 1953]; *Cohen* v. *Young*, 127 F. 2d 721 [6th Cir., 1942]), they are foreclosed from collateral attack.

Where a stockholder's derivative action, after due notice to all stockholders pursuant to Rule 23(c), terminates in a final judgment based upon judicial examination and approval of a settlement of the controversy, can a dissatisfied stockholder who appeared through counsel at the hearing avoid the normal *res judicata* operation of such judgment by a collateral attack in a foreign jurisdiction based upon a conclusory claim of "collusion"?

Petitioners' failure to find any authority for the affirmative is not surprising. It results from their failure to comprehend the rationale behind Rule 23(c)'s requirement of court approval after notice to all stockholders. This Rule not only required the Nevada Court to consider the bona fides of the action and of its compromise, but also imposed upon each stockholder, including the Novembers and their alter ego, Reich, the obligation of coming forward in the Nevada Court with any claim of vitiating collusion or being forever barred from contesting that issue elsewhere.

> *Piccard* v. *Sperry Corp.*, 36 F. Supp. 106 (S. D. N. Y., 1941), aff'd. 120 F. 2d 328 (2nd Cir., 1941);
> *Cohen* v. *Young*, 127 F. 2d 721 (6th Cir., 1942);
> *Upson* v. *Otis*, 155 F. 2d 606 (2nd Cir., 1946).

To protect the corporation and thereby all the stockholders, the court was charged with, and conscientiously discharged, the task of deciding whether any collusion existed.

Winkelman v. *General Motors Corporation,* 48 F. Supp. 490 (S. D. N. Y., 1942);
Pergament v. *Frazer,* 93 F. Supp. 13 (E. D., Mich., 1950), aff'd. 203 F. 2d 315 (6th Cir., 1953), cert. den. 346 U. S. 832 (1953);
Pottish v. *Divak,* 71 F. Supp. 737 (S. D. N. Y., 1947).

Conclusive authority against Petitioners' argument lies in the fact that Rule 23(c) accords each stockholder the following rights: he may offer evidence in support of, or in opposition to, the proposed dismissal and, without formal intervention, may appeal directly from the trial court's eventual approval or non-approval. *Cohen* v. *Young,* 127 F. 2d 721 (6th Cir., 1942); *Masterson* v. *Pergament,* 203 F. 2d 315 (6th Cir., 1953).

Here the Nevada Court, in considering the evidence and in finding that the action and proceedings before it were adversary and non-collusive, conscientiously fulfilled the duty imposed upon it by Rule 23(c). Petitioners, on the other hand, after failing to present evidence, if any they had, in Nevada, and failing to appeal from the Nevada judgment, cannot raise the collusion issue collaterally.

The recent litigation in the Sixth and Second Circuits affecting the Kaiser-Frazer Corporation is completely dispositive of Petitioners' contention.

See

Pergament v. *Frazer, et al.,* 93 F. Supp. 13 (E. D., Mich., 1950), aff'd. 203 F. 2d 315 (6th Cir., 1953), cert. den. 346 U. S. 832 (1953); and
Stella v. *Kaiser, et al.,* 218 F. 2d 64 (2nd Cir., 1954).

In the *Kaiser-Frazer* situation six stockholders' actions were pending in various courts in different states—three in Federal and three in State courts. Defendants chose to negotiate a settlement with the attorneys representing Pergament in the Eastern District of Michigan. Eventually, and without consulting counsel for the plaintiffs in the other actions, a settlement of the entire controversy was reached. The settlement was then placed before the Michigan Court for its approval.

After extended hearings and close analysis, the Court approved the settlement and dismissed the action with prejudice. In describing the effect of this judgment, it stated, 93 F. Supp. at p. 17:

> "On or about September 21, or 25, 1949, Pergament and London, plaintiffs in this action, began conferences with defendants through their attorneys, having as their objective settlement of this and all derivative suits begun by stockholders. A settlement agreement was arrived at October 25, 1949.
>
> "That proposed compromise is now before this court and if approved will serve to dismiss not only the Pergament-London action but will eliminate all other stockholders' derivative suits heretofore started."

On appeal the District Court's approval was affirmed. *Masterson* v. *Pergament*, 203 F. 2d 315 (6th Cir., 1953), cert. den., 346 U. S. 832 (1953).

The matter, however, was not permitted to rest. Another stockholder, Stella, sought to renew and press an action which he had instituted in the Southern District of New York (see 82 F. Supp. 301) *prior* to the institution of the *Pergament* action in Michigan. There is a precise parallel of this sequence to the oft-labored fact that the Castleman-California action preceded the Castleman-Nevada action by eight days. Stella was met with the claim that the Pergament settlement and judgment of dismissal were *res judicata* to which he replied, *inter alia*, that the Michigan

judgment was so fatally tinged with fraud as to permit a collateral attack to be maintained in New York.

Summary judgment granted the defendants was affirmed. *Stella* v. *Kaiser*, 218 F. 2d 64 (2nd Cir., 1954).

The case is precisely analogous. Reich has no standing to assert—on behalf of any RKO stockholder, whether actually present before Judge McNamee on March 22, 1954 or not—that a collateral attack can be levied in the California courts now against the Nevada Court's judgment of dismissal with prejudice entered after notice to all RKO stockholders.

CONCLUSION

The petition for certiorari is so clearly without merit as to verge upon the frivolous. The petition accordingly should be denied.

Respectfully submitted,

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